No. 91-2045

In the Supreme Court of the United States

OCTOBER TERM, 1992

R. GORDON DARBY, ET AL., PETITIONERS

v.

HENRY G. CISNEROS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether petitioners were required to exhaust their administrative remedies before seeking judicial review of sanctions recommended by a hearing officer of the Department of Housing and Urban Development.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulations and rules:

Statutes, regulations and rules—Continued: Page

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-7a) is reported at 957 F.2d 145. The decisions of the district court (Pet. App. 8a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1992. A petition for rehearing was denied on March 20, 1992. The petition for a writ of certiorari was filed on June 18, 1992, and was granted on November 2, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 10(a) and 10(c) of the Administrative Procedure Act, 5 U.S.C. 702 and 704, and pertinent

portions of the debarment regulations of the Department of Housing and Urban Development, 24 C.F.R. 24.314 and 24 C.F.R. 26.25(a), are reproduced in an appendix to this brief.

STATEMENT

Petitioner R. Gordon Darby is a real estate developer who participated in a scheme that used HUD's single-family mortgage insurance program to build, develop, and finance multifamily housing projects. Petitioner sought to evade limitations on the number of HUD-insured properties that could be held by the same borrower in the same location by arranging for straw buyers to temporarily hold title to the properties. Petitioner also sought to evade a minimum investment requirement by characterizing certain transactions as refinances rather than sales. This case involves action taken by HUD against petitioner because of his use of this scheme.

1. Pursuant to Section 203(b) of the National Housing Act, 12 U.S.C. 1709(b), HUD provides for the insurance of single-family mortgages. Pet. App. 38a. The purpose of the Section 203(b) program is to facilitate home ownership by owner-occupants. *Ibid.* Until recently, investors were permitted to obtain insurance under the program in some instances. *Ibid.*[1]

In the early 1980s, use of the Section 203(b) program by investors was subject to two pertinent restrictions. First, Section 203(b) provided that HUD generally could insure no more than 97% of the first $25,000 of a mortgage and 95% of any ex-

[1] Investors are no longer eligible for mortgage insurance under the single family mortgage insurance program. See Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, § 143, 103 Stat. 2036.

cess over $25,000 for owner-occupants. 12 U.S.C. 1709(b)(2) (1982); see Pet. App. 38a-39a. Investors, however, were subject to more stringent limits; HUD would not insure more than 85% of a mortgage obtained by an investor. 12 U.S.C. 1709(b)(8) (1982); see Pet. App. 38a n.4. In cases in which the insured mortgage was sought in a refinancing transaction, no minimum investment was required of either an owner-occupant or an investor. Pet. App. 39a & n.5.

Second, pursuant to a HUD regulation known as the "Rule of Seven," 24 C.F.R. 203.42 (1982), HUD limited the number of HUD-insured properties that a single borrower could own in a single location. The regulation provided that a mortgage on a property containing a dwelling unit to be rented by the mortgagor was ineligible for insurance if the property was part of (or adjacent or contiguous to) a group of eight or more related properties in which the mortgagor or principal had any financial interest. Pet. App. 40a. The Rule of Seven was intended to reduce the risk of mass defaults by limiting the number of single-family mortgages given to a single borrower in a particular location. Pet. App. 41a. Other HUD programs, with different and more stringent underwriting requirements, were designed to control the increased risks of large-scale defaults when HUD insures a large number of mortgages for a single developer in a single area. Pet. App. 41a-42a.

2. In 1982, petitioners Darby, Darby Development Company (a company of which Darby was sole owner), and MD Investment (a partnership between Darby and a builder named Curtis Martin) owned 44 completed but unsold townhouses in two housing developments in South Carolina known as Bay Tree and Oakfield. Pet. App. 55a-56a. Those properties

were subject to outstanding loans at high interest rates, and Darby needed to obtain permanent financing at a lower rate. Pet. App. 56a. Darby also had an ownership interest in 52 properties at a development known as Parkbrook Acres. Pet. App. 60a. The other owner of Parkbrook Acres, Lonnie Garvin, Jr., was the President of Mid-South Mortgage Company. Garvin originated and participated in the scheme to circumvent HUD's statute and regulations. Pet. App. 44a, 60a.[2]

With respect to the Bay Tree and Oakfield properties, Darby arranged for applications for HUD-insured mortgages to be submitted between August and November 1982. Pet. App. 59a. Darby completed seven applications in his own name. Pet. App. 57a & n.28. Darby arranged for title to each of the remaining properties to be transferred to Garvin or to one of three employees of Mid-South. Transfer was effected by a deed which indicated that the property had been sold to the transferee for $5, plus an assumption of the mortgage. Pet. App. 59a. The applications for mortgages for those properties were in the names of the transferees. Pet. App. 59a-60a. Each transferee's mortgage application stated in two places that the loan was a "refinance," and each application stated that the propery involved was not a part of or adjacent to any project involving eight or more properties in which the borrower had a financial interest. Pet. App. 58a. Each of the loan closings took place in January 1983. Pet. App. 59a.

[2] Garvin is not a party to this proceeding. He has, however, been debarred twice for violating HUD requirements. See *In re Lonnie A. Garvin, Jr.*, Nos. HUDALJ 90-1415-DB/90-1506DB & 91-1724DB. His challenge to the first debarment is currently pending in district court. *Garvin* v. *Kemp*, C.A. No. 2:91-1406-18 (D. S.C.).

Approximately three weeks after each closing, the new owner deeded the property back to the original owner—either Darby or a firm in which Darby had an ownership interest. Pet. App. 60a. A similar scheme was used with regard to the Parkbrook Acres properties. *Ibid.*

By using the individual loan applicants as "straw" purchasers and ensuring that no individual held title to more than seven properties at the time of closing, Darby sought to evade the Rule of Seven. Pet. App. 22a. By stating that the purpose of the loan was to "refinance," Darby further avoided the need to make any cash investment in each property. Pet. App. 59a. From the proceeds of the mortgages, Darby and his co-developers paid off the construction loans on the properties and in addition obtained $529,000 in cash from the Bay Tree and Oakfield projects and $440,000 from the Parkbrook project. Pet. App. 59a, 61a.

Petitioners later defaulted on all of the HUD-insured mortgages. Pet. App. 61a-66a. HUD was required to pay approximately $6.6 million in insurance claims on the defaulted loans for the two projects. Pet. App. 65a-66a.

3. On June 19, 1989, HUD issued a limited denial of participation (LDP) that prohibited petitioners from participating in any program in South Carolina administered by the Assistant Secretary for Housing for one year. Pet. App. 13a, 34a. See 24 C.F.R. 24.700 *et seq.* On August 23, 1989, the Assistant Secretary sent petitioners a notice of proposed debarment for a five-year period based on the Bay Tree and Oakfield transactions. See 24 C.F.R. 24.312. On November 16, 1989, after learning of the additional Parkbrook Acres transactions, the Assistant Secretary amended the notice to propose an indefinite debarment. Pet. App. 34a & n.1. For the period of

debarment, an individual or entity that is debarred may not participate in nonprocurement transactions with HUD or any other federal agency and in procurement contracts with HUD. 24 C.F.R. 24.200; see Pet. App. 34a.

Petitioners requested a hearing concerning the LDP and the proposed debarment, and an administrative law judge held a four-day hearing in December 1989. Pet. App. 13a; see 24 C.F.R. 24.313(a). On April 13, 1990, the ALJ issued an "Initial Decision and Order." Pet. App. 33a-90a. Rejecting each of petitioners' defenses on the merits, the ALJ found that the financing method used by petitioners "was a sham which improperly circumvented the Rule of Seven." Pet. App. 69a. The ALJ determined that submission of the mortgage applications in the names of the nominees "was fundamentally improper because their involvement was for the sole purpose of obtaining federally insured mortgages, the benefits of which ran to individuals and entities which could not have obtained that mortgage insurance" under the Rule of Seven. Pet. App. 71a n.35. The ALJ also ruled that petitioners were "required * * * to satisfy the minimum investment requirements," Pet. App. 78a, but avoided those requirements by falsely characterizing the transactions as refinances rather than sales. Pet. App. 71a-72a.

Despite the evidence that petitioners "willfully and materially violated statutory and regulatory provisions and program requirements" and made "false statements on applications for FHA insurance," Pet. App. 79a, the ALJ found that "mitigating factors exist which weigh against imposition of an indefinite debarment." Pet. App. 87a. The ALJ noted that "most of the relevant facts were * * * disclosed to

the [local] HUD * * * Office and a Headquarters employee," that there was a "lack of criminal intent," and that petitioner Darby "genuinely cooperated with HUD to try [to] work out his financial dilemma and avoid foreclosure." Pet. App. 87a-88a. The ALJ found that, under the circumstances, an indefinite debarment would "serve no legitimate purpose." Pet. App. 88a. He therefore concluded that "good cause exist[ed] to debar" petitioners for a period of 18 months. Pet. App. 90a.

Under HUD rules, "[t]he hearing officer's determination shall be final unless * * * the Secretary or the Secretary's designee, within 30 days of receipt of a request decides as a matter of discretion to review the finding of the hearing officer." 24 C.F.R. 24.314(c). The rules provide that "[a]ny party may request such a review * * * within 15 days of receipt of the hearing officer's determination." *Ibid.* Petitioners did not seek further administrative review of the ALJ's "Initial Decision and Order." Pet. App. 3a. On June 21, 1990, the Assistant Secretary for Housing-Federal Housing Commissioner issued a "Final Determination" imposing the debarment. Pet. App. 91a-92a.

4. a. On May 31, 1990, prior to the issuance of the Final Determination, petitioners brought suit in district court seeking a declaration that the LDP and debarment violated the Administrative Procedure Act and due process rights guaranteed by the Fifth Amendment. Pet. App. 3a. The district court denied the government's motion to dismiss the case for failure to exhaust administrative remedies. Pet. App. 20a-32a. The court acknowledged that it was guided by "the general rule at common law that administrative remedies must be exhausted prior to proceeding

in court." Pet. App. 28a. But the court declined to apply the doctrine in this case.

The court relied on the fact that the time for filing for review by the Secretary had by that time long passed, and that petitioners accordingly would be denied any judicial review if the exhaustion doctrine were applied. Pet. App. 28a. The court also found that the administrative remedy was inadequate because the Secretary could delay the final disposition of the review proceeding indefinitely by extending the 30-day time periods within which he was required first to decide whether to review the ALJ's decision and then to reach his own decision on the matter. Pet. App. 28a-29a. See 24 C.F.R. 24.314(c), 24.314(e). Finally, the court stated that the administrative remedy would have been "futile," Pet. App. 29a, although the court did not further explain that ruling. The district court later reversed the debarment on its merits. Pet. App. 8a-19a.[3]

b. The court of appeals reversed, holding that petitioners were required to exhaust the available ad-

[3] Although petitioners' LDP and debarment had already expired when the district court reached its final judgment, the district court correctly held that this case is not moot. Pet. App. 14a n.8. Under HUD regulations, participants in HUD programs must inform HUD of any debarments (but not LDPs) within the preceding ten years, 24 C.F.R. 200.219(a)(2)(vi), and HUD may use that information in determining whether the participant is a "responsible * * * organization[]" that "will honor [its] legal, financial and contractual obligations." 24 C.F.R. 200.20; see 24 C.F.R. 200.228. Such collateral consequences of a debarment can preserve the controversy between the parties, notwithstanding the fact that the period of the debarment has expired. See *Caiola* v. *Carroll*, 851 F.2d 395, 401 (D.C. Cir. 1988); cf. *Sibron* v. *New York*, 392 U.S. 40, 50-58 (1968); *Carafas* v. *LaVallee*, 391 U.S. 234 (1968).

ministrative remedy—in this case, review by the Secretary of the ALJ's decision—before seeking judicial review. Pet. App. 4a. The court held that the requirement of exhaustion permits an agency to exercise its discretion and apply its expertise, ensures agency autonomy, and avoids premature intervention by the courts. *Ibid.* The court held that petitioners' failure to exhaust administrative remedies was not exclused by the alleged futility or inadequacy of those remedies. Pet. App. 5a. Nor did the fact that the time for seeking administrative review had already passed excuse their failure to exhaust. The court noted that petitioners, "by strategic decision or otherwise, allowed the filing period to pass," and accordingly "cannot now complain that the decision is unreviewable." Pet. App. 6a. Accordingly, the court of appeals reversed and remanded the case with instructions to dismiss. Pet. App. 7a.

SUMMARY OF ARGUMENT

For nearly a century, this Court has recognized the authority of federal courts to require exhaustion of administrative remedies. Petitioners nevertheless contend that when Congress adopted the Administrative Procedure Act in 1946, it provided that courts could not exercise their traditional discretion to require exhaustion, in the interests of administrative and judicial efficiency, for any action brought under the APA. The APA says no such thing, and the court of appeals correctly determined that settled legal principles required exhaustion of the administrative remedy available to petitioners in this case.

I. Petitioners' claim that the judicial doctrine of exhaustion of administrative remedies does not apply to actions for judicial review under the APA rests solely on a circumscribed reading of Section 10(c) of

the APA. That interpretation is in no sense required by the plain language of Section 10(c), is refuted by the language of Section 10(a), and is inconsistent with the legislative history of the APA and this Court's precedents.

A. Section 10(c) provides that courts have jurisdiction to review only "final agency action." Congress further provided in Section 10(c) that this prerequisite for judicial review—the requirement of finality—could be satisfied without completion of an agency appeal "unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative." For this reason, Section 10(c) does not *preclude* review of petitioners' claim. But nor does it *require* review under circumstances where courts would traditionally impose an exhaustion requirement in the interests of administrative and judicial efficiency.

Section 10(c) sets forth the requirement of finality, but it does not address the requirement of exhaustion of administrative remedies. It contains no reference to the term "exhaustion," and provides only that agency action must be final to be "subject to judicial review." The section therefore does not address the question whether courts may continue to impose other conditions on the timing of their exercise of jurisdiction to review final action. Moreover, Section 10(a) of the APA, adopted in 1976, confirmed that "nothing herein * * * affects other limitations on judicial review," and courts adjudicating APA claims retain "the power or duty * * * to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702. The committee reports explaining the addition to Section 10(a) expressly state that this proviso was intended to con-

firm that courts retain authority to require exhaustion of administrative remedies.

B. This Court has never construed Section 10(c) to preclude judicial imposition of appropriate exhaustion requirements. Instead, the Court has previously characterized exhaustion and finality as distinct (but related) doctrines. *McCarthy* v. *Madigan*, 112 S. Ct. 1081, 1086 (1992). Moreover, in *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 162-163 (1967), this Court suggested that issues of finality in APA actions must be resolved under the terms of Section 10(c), but that issues of exhaustion are appropriately considered under pre-APA exhaustion jurisprudence. This interpretation of Section 10(c) also derives support from analogous cases in the areas of ripeness, abstention, and primary jurisdiction. In those areas, the Court has held that a congressional grant of jurisdiction does not preclude courts from deferring adjudication of controversies that should first be presented to another forum. If the same rule were not applied here, litigants would be able to freely bypass available administrative remedies, and federal courts would be required to adjudicate a variety of controversies that could have been resolved more efficiently through agency processes.

II. The court of appeals correctly determined that settled principles required petitioners to exhaust HUD's administrative appeal process. The "general rule" that exhaustion should be required to serve the "twin purposes of protecting administrative agency authority and promoting judicial efficiency" is fully applicable here, because the available administrative remedy would not in any way unduly burden a litigant's right to obtain judicial review of HUD debarment decisions. *McCarthy*, 112 S. Ct. at 1086.

A. Although a hearing officer is authorized to conduct debarment hearings and issue an "initial decision," any party to the debarment may request discretionary review by the Secretary. 24 C.F.R. 24.314(c). During the pendency of the petition for review, the debarment order is not given operative effect, see 48 Fed. Reg. 43,304 (1983), and the Secretary has authority to reach an independent decision as to whether debarment is warranted. 24 C.F.R. 24.314(e). Secretarial review of debarment orders would almost certainly prove to be important in any subsequent district court action because "[e]xhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise." *McCarthy*, 112 S. Ct. at 1086.

B. The administrative remedy at issue here is fair and effective. It does not engender extended delays or present procedural traps. Under time periods established by HUD's regulations for consideration of petitions for review by the Secretary, debarment appeals will ordinarily be resolved in less than three months. Because the debarment order does not take effect during this period, and because the Secretary could grant complete relief by vacating the order, there is no need to grant judicial review prior to exhaustion of this available remedy. Petitioners offered no excuse for their failure to pursue their right to seek review by the Secretary. The court of appeals therefore correctly dismissed petitioner's action.

ARGUMENT

I. SECTION 10(c) OF THE ADMINISTRATIVE PROCEDURE ACT DOES NOT EXCUSE PETITIONERS' FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

It is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). As this Court explained long ago in *United States* v. *Sing Tuck*, 194 U.S. 161 (1904), "it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way," *id.* at 168, and an available administrative appeal route therefore "must be followed before there can be a resort to the courts." *Id.* at 167-168. Petitioners' assertion that Section 10(c) of the Administrative Procedure Act (APA), 5 U.S.C. 704, rendered the exhaustion doctrine inapplicable in any action for judicial review under the APA is mistaken. It is not required by the language of Section 10(c), it is squarely contradicted by the 1976 amendment to Section 10(a) of the APA, 5 U.S.C. 702, and it is inconsistent with decisions of this Court. If adopted, the rule proposed by petitioner would disrupt the orderly review of agency action under the APA.

A. The Statutory Language And Legislative History Of The Judicial Review Provisions Of The APA Make Clear That The Settled Rule Requiring Exhaustion Of Adequate Administrative Remedies Applies To Cases Brought Under The APA

1. Section 10 of the Administrative Procedure Act, ch. 324, 60 Stat. 243-244 (5 U.S.C. 701-706), creates

and specifies the incidents of a cause of action for judicial review of agency action. See *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. 3177, 3186 (1990); *Califano* v. *Sanders*, 430 U.S. 99 (1977). Section 10(a), 5 U.S.C. 702, provides that "[a] person suffering legal wrong because of agency action * * * is entitled to judicial review thereof." Section 10(b), 5 U.S.C. 703, provides for the form and venue of the proceeding. Section 10(c), 5 U.S.C. 704, the provision at issue in this case, limits that entitlement. It provides, in relevant part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

The plain terms of Section 10(c) preclude judicial review of any agency decision that is not final, and specify how the requirement of finality may be satisfied. As the first sentence makes clear, it is only "final agency action" that is "subject to judicial review" under Section 10(c). The second sentence provides that non-final, intermediate actions, though not directly reviewable, are "subject to review on the review of the final agency action." The first part of

the third sentence specifies that an agency decision is final even if agency rehearing proceedings were not requested. The last part of the third sentence specifies that the agency decision will also be regarded as final even if an "appeal to superior agency authority" was not requested, unless an agency rule requires such an appeal and suspends the effect of the decision while the appeal is prosecuted.

By its terms, Section 10(c) thus creates a general "finality" requirement that qualifies the right of access to the courts granted in Section 10(a). Unless agency action meets the finality requirements of Section 10(c), the cause of action created by Section 10(a) is unavailable and judicial review under the APA is precluded. Whatever the prudential considerations that might be thought to justify review of a particular agency action that is not final under Section 10(c), a plaintiff may obtain such review only pursuant to a right of action created by a source of law other than the APA, or not at all.

2. Petitioners' theory is that Section 10(c), by providing that "final agency action * * * [is] subject to judicial review," requires a court to provide such review on demand by the plaintiff, notwithstanding any other source of law—such as the exhaustion doctrine—that controls the timing of such review. Although petitioners assert that their theory rests on the "explicit" terms of Section 10(c), Pet. Br. 8; see *id.* at 11, their theory is not required by the express language or enactment history of the APA. As explained above, the language of Section 10(c) is addressed to a much narrower issue: finality. Section 10(c) *precludes* review unless the agency action is final, but it does not *require* review under circum-

stances where courts would traditionally impose an exhaustion requirement. Nowhere does the statute even mention the exhaustion doctrine, which was already well established at the time the APA was enacted, or the consequences of the prospective plaintiff's failure to exhaust administrative remedies.[4] Section 10(c) includes no direction that courts must disregard their interests in promoting effective and efficient judicial review in all APA actions. See pp. 23-26, *infra*.

Moreover, petitioners' claim that the exhaustion doctrine no longer applies in APA actions is directly contradicted by provisions of Section 10(a) that Congress adopted in 1976. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721. At that time, Congress amended Section 10(a)—the basic provision granting a right of judicial review to those aggrieved by agency action—to eliminate the defense of sovereign immunity in most APA cases. But Congress sought to ensure that other traditional doctrines invoked by courts to limit judicial review remained applicable. Congress therefore provided that "[n]oth-

[4] Numerous statutes expressly require exhaustion of administrative remedies, in some instances subject to qualifications, as a prerequisite to suit in federal court. See, *e.g.*, 7 U.S.C. 1105(a); 25 U.S.C. 1724(i)(3); 26 U.S.C. 7428(b)(2); 26 U.S.C. 7476(b)(3); 26 U.S.C. 7478(b)(2); 28 U.S.C. 2637(b) and (d); 42 U.S.C. 10807(a); 43 U.S.C. 1632(a); 42 U.S.C. 3789d(c)(4)(A); 42 U.S.C. 1632(a). Some statutes, primarily in the civil rights area, expressly excuse a plaintiff's failure to exhaust administrative remedies. See, *e.g.*, 7 U.S.C. 2305(d); 29 U.S.C. 1854(a); 42 U.S.C. 1971(d); 42 U.S.C. 1973j(f); 42 U.S.C. 2000a-6(a). Other statutes require or excuse exhaustion in specific circumstances. See, *e.g.*, 42 U.S.C. 1997e(a); 42 U.S.C. 6104(f).

ing herein * * * affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702. By recognizing that "other limitations on judicial review" survived the APA and that a court may "dismiss an action or deny relief" on an "apppropriate * * * equitable ground," Congress expressly recognized the continuing applicability of the exhaustion doctrine—as well as other equitable defenses and remedial doctrines—in APA cases.

The enactment history of the 1976 amendment to the APA confirms this interpretation. Both the House and Senate committee reports on the amendment expressly stated that the proviso to Section 10(a) preserved judicial authority to continue to impose exhaustion requirements on APA litigants. The Senate committee report noted that the proviso acknowledged the continuing applicability of "methods found in the substantial and growing body of law governing availability, timing, and scope of judicial review," and that those "methods" included the "defenses" of "(1) statutory preclusion; (2) lack of ripeness; (3) *failure to exhaust administrative remedies*; and (4) lack of standing." S. Rep. No. 996, 94th Cong., 2d Sess. 9 (1976) (emphasis added). See also *id.* at 11 (explaining proviso to preserve existing grounds for denial of relief, such as "failure to exhaust administrative remedies"); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9, 12 (1976). The Department of Justice[5]

[5] In a letter to the Chairman of the Senate Subcommittee on Administrative Practice and Procedure, then-Assistant Attorney General Scalia noted that the "failure to exhaust administrative remedies," among other doctrines, would continue to be available as a defense in cases previously dismissed

and the Administrative Conference of the United States, which initiated the proposal to amend the APA,[6] manifested a similar understanding that the exhaustion doctrine was an "appropriate * * * equitable ground" on which courts could dispose of cases seeking judicial review.

Congress's express recognition of the continuing vitality of the exhaustion doctrine in 1976—and its enactment of statutory language recognizing that courts may continue to apply such traditional doctrines in APA cases—is fundamentally at odds with petitioners' construction of Section 10(c). The core premise of petitioners' theory is that Section 10(c) repudiated the exhaustion doctrine and required judicial review to proceed notwithstanding traditional equitable defenses governing the timing and availability of such review. Nothing in the language of Section 10(c) requires that conclusion. And Congress's recognition in Section 10(a) of traditional equitable defenses—including the exhaustion doctrine—makes clear that Section 10(c) had not repudiated that doctrine 30 years earlier.

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on sovereign immunity grounds. S. Rep. No. 996, 94th Cong., 2d Sess. 26 (1976).

[6] Roger Cramton, who prepared the proposal for the Administrative Conference, explained that abolition of sovereign immunity would not affect "[g]rounds for dismissal or denial of relief under present law," including "[t]he plaintiff's failure to exhaust his administrative remedies." 1 Recommendations and Reports of the Administrative Conference of the United States 222, 223 (1968-1970). Indeed, the Administrative Conference proposal followed the reference to the exhaustion doctrine with a citation to the leading case applying pre-APA exhaustion principles, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), and not to Section 10(c) of the APA.

3. Although petitioners claim (Pet. Br. 12-14) that the legislative history of Section 10(c) supports their construction of the statute, it would make little sense to credit that interpretation of the legislative history in light of the express terms of the proviso adopted in 1976. In any event, the 1945 legislative history, read as a whole, supports the conclusion that Congress did not intend Section 10(c) to eliminate judicial authority to require exhaustion.

Petitioners rely, for example, on an analysis of Section 10(c) by Attorney General Clark reprinted in the Senate Report that accompanied the Act. Pet. Br. 12. The Attorney General initiated his discussion, however, with the statement that Section 10(c) was "intended to state existing law." S. Rep. No. 752, 79th Cong., 1st Sess. 44 (1945). That theme was repeated throughout the legislative history. In introducing the APA on the House floor, Representative Walter, the Chairman of the House subcommittee that drafted it, stated that "the provisions of [Section 10(c)] are technical but involve no departure from the usual and well understood rules of procedure in this field." 92 Cong. Rec. 5654 (1946). See also *Attorney General's Manual on the Administrative Procedure Act* 93 (1947) ("The provisions of section 10 constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions. * * * [T]he general principles stated in section 10 must be carefully coordinated with existing statutory provisions and case law."); *id.* at 101 (quoting Rep. Walter's statement).

"[E]xisting law" and "the usual and well understood rules of procedure" at the time the APA was enacted plainly permitted federal courts to require

exhaustion of adequate administrative remedies.[7] Therefore, it is highly unlikely that Section 10(c) was intended to deprive courts of their traditional authority to require exhaustion of administrative remedies (including appeals) when the needs of administrative autonomy and judicial efficiency outweigh private interests in early access to a judicial forum.

Even the portion of Attorney General Clark's statement upon which petitioners rely does not support their argument. The Attorney General stated that "the doctrine of exhaustion of administrative remedies *with respect to finality of agency action* is intended to be applicable only" where required by statute, or in the circumstances set forth in the last sentence of Section 10(c). S. Rep. No. 752, *supra*, at 44 (emphasis added). The clear import of that statement is that exhaustion requirements designed to preclude judicial review of non-final or preliminary agency action would thereafter be applicable only in accord with Section 10(c). As this Court has suggested, however, the doctrine of "finality"— to which Section 10(c) is directed—is distinct from the related doctrine of exhaustion of administrative remedies. *McCarthy* v. *Madigan*, 112 S. Ct. 1081, 1086 (1992) ("The doctrine of exhaustion of administrative remedies is one among many related doctrines—

[7] See, *e.g.*, *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752 (1947); *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540 (1946); *Illinois Commerce Comm'n* v. *Thomson*, 318 U.S. 675, 686 (1943); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 n.9 (1938) (citing cases); *First Nat'l Bank* v. *Board of County Commissioners*, 264 U.S. 450 (1924); *Pacific Live Stock Co.* v. *Lewis*, 241 U.S. 440 (1916); *United States* v. *Sing Tuck*, 194 U.S. 161 (1904).

including abstention, finality, and ripeness—that govern the timing of federal court decisionmaking.").

Petitioners also cite excerpts from the legislative history indicating that Congress did not intend to give agencies the power to preclude judicial review altogether by requiring an administrative appeal without suspending the effectiveness of the decision appealed. See Pet. Br. 12-13. But those excerpts do not show that Congress intended to forbid the courts from concluding, as they had been doing for decades, that the need for the orderly administration of justice, agency autonomy, and efficient utilization of judicial resources dictate that plaintiffs generally be required to exhaust prompt, effective administrative appeal processes before seeking judicial review of agency action.

B. This Court's Decisions Support The Continued Applicability Of The Exhaustion Requirement In APA Cases

1. This Court has indicated on a number of occasions that the requirement of finality in Section 10(c) is distinct from the exhaustion requirement, which continues to apply to judicial review of APA actions. For example, in *United States* v. *Standard Oil Co.*, 449 U.S. 232 (1980), the plaintiff claimed that the issuance of a complaint by the FTC was subject to judicial review because the plaintiff had exhausted all of its administrative remedies by moving unsuccessfully for dismissal of the complaint before the agency. The Court held that the plaintiff had "mistaken exhaustion for finality." *Id.* at 243. Although the Court agreed that the plaintiff "may well have exhausted its administrative remedy," *ibid.*, the Court found that the issuance of a complaint was

not a "final" agency action subject to judicial review under Section 10(c). 449 U.S. at 238.

This Court's other cases discussing Section 10(c) also support the view that it addresses issues of finality, but not the distinct question whether the party seeking judicial review should exhaust its administrative remedies for other reasons.[8] For example, in *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967), the Court noted that the challenged agency regulation was "final" under Section 10(c), 387 U.S. at 162, but ordered the litigants to "exhaust" an available "administrative process" so that "more light may be thrown" on the justifications for the agency action, and thereby put the courts in "a better position" to resolve the issues presented. *Id.* at 166. The Court indicated that the question whether exhaustion would be required was separate from the issue of finality. *Id.* at 163. Further, in its discussion of the exhaustion issue, the Court relied on cases applying the judicially imposed doctrine of exhaustion—not Section 10(c)—as authority. *E.g.*, *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 540-541 (1954); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562-563 (1919).

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[8] The Court cited Section 10(c) in *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. 3177, 3185 (1990), for the proposition that "[w]hen, as here, review is sought * * * only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'" See also, *e.g.*, *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2773 (1992); *Bowen* v. *Massachusetts*, 487 U.S. 879, 902 n.35 (1988) (noting that "it is certainly arguable that by enacting § 704 Congress merely meant to ensure that judicial review would be limited to final agency actions and to those nonfinal agency actions for which there would be no adequate remedy later"); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967).

2. Petitioners are mistaken in contending (Pet. Br. 9, 14-15, 17-18) that the decisions of this Court in *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284-285 (1987), and *Levers* v. *Anderson*, 326 U.S. 219 (1945), support their contention here. In *Brotherhood of Locomotive Engineers*, *supra*, the Court indicated that a party may generally seek judicial review of agency action without availing itself of an opportunity to file a petition for reconsideration. A petition for reconsideration simply asks the same agency decisionmaker to take a second look at a decision it has already made, and courts traditionally have not required exhaustion of such procedures. See *Levers*, 326 U.S. at 222 & n.3. Further, there was no necessity for the Court in *Brotherhood of Locomotive Engineers* to even examine whether traditional exhaustion principles were superseded by Section 10(c).[9]

Levers v. *Anderson*, 326 U.S. 219 (1945), also did not present the issue raised by petitioners here. The plaintiff in *Levers* failed to file a motion for rehearing—a motion that would not have been required under traditional exhaustion principles. The Court concluded that the motion was "so much like the normal, formal type of motion for rehearing," 326 U.S. at 224, which the government had conceded was

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[9] The issue presented was one relating to finality: when did the agency decision become final under circumstances where the litigant had sought reconsideration. In any event, the distinction between motions for reconsideration and appeals to higher authority is a familiar one, and is embodied in other statutes governing judicial review. For example, a district court's decision must ordinarily be reviewed by a court of appeals before this Court will review it, even though the filing of a petition for rehearing with the court of appeals is not a prerequisite to this Court's review.

a "mere formalit[y] which waste[s] the time of litigants and tribunals," *id.* at 222, that it was not a prerequisite to judicial review. Even in that situation, however, the Court noted that it was not deciding whether the reviewing court might have discretionary power to stay its proceedings until the plaintiff sought administrative reconsideration. *Ibid.*[10]

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[10] Petitioners state that Section 10(c) "frequently has been overlooked" (Pet. Br. 16), but nonetheless claim that their position is supported by "the majority of federal courts which have addressed the issue" (*Ibid.*). We disagree. Although the Ninth Circuit at one time appeared to have adopted petitioners' position, see *United States* v. *Consolidated Mines & Smelting Co.*, 455 F.2d 432, 439-440 (9th Cir. 1971), the court even there noted that it is "desirable to give highest agency authority an opportunity to formulate policy and rules before the courts are required to act," *id.* at 439 n.3, and later abandoned petitioners' interpretation in *Montgomery* v. *Rumsfeld*, 572 F.2d 250, 253 (9th Cir. 1978). Petitioners cite *New England Coalition on Nuclear Pollution* v. *United States Nuclear Regulatory Comm'n*, 582 F.2d 87, 99 (1st Cir. 1978). But in that case, the agency itself did not regard exhaustion of its internal administrative appeals process as a prerequisite to judicial review. Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 766-767 (1975) (Secretary may waive further exhaustion). And in *Steere Tank Lines, Inc.* v. *ICC*, 675 F.2d 763 (5th Cir. 1982), the court reached the same conclusion as did the Fourth Circuit in this case, finding the agency action in question to be final but holding that the plaintiff's failure to take an administrative appeal from that action precluded judicial review. See *id.* at 766. Cf. *Peter Kiewit Sons' Co.* v. *U.S. Army Corps of Engineers*, 714 F.2d 163, 167-168 (D.C. Cir. 1983) (plaintiff had not satisfied requirement of finality or exhaustion). Finally, the D.C. Circuit's statement in *Gulf Oil Corp.* v. *United States Department of Energy*, 663 F.2d 296, 308 n.73 (D.C. Cir. 1981), is plainly dictum, and, in any event, that case concerned the unusual situation in which it was alleged that agency officials were engaged in a pattern of wrongdoing (including destruction of relevant documents and ex parte communications between the hearing officer and enforcement personnel) that subverted agency processes. *Id.* at 297-298, 309.

3. Outside the context of the exhaustion doctrine, this Court has regularly rejected contentions closely analogous to those of petitioners. A plaintiff's compliance with all statutory requirements for filing suit on a case within a district court's jurisdiction, *i.e.*, a case otherwise "subject to judicial review" in the terms of Section 10(c), 5 U.S.C. 704, has not been sufficient to mandate adjudication of the case. Like exhaustion, a number of other judicial doctrines may still properly affect the time when a plaintiff's claim is appropriate for adjudication.

First, the doctrine of ripeness, some aspects of which are codified in Section 10(c), has been held to bar premature review of agency action, even if the action is final within the meaning of Section 10(c) and otherwise subject to judicial review. See *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967). Cf. *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340 (1986); *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 512 (1984). Petitioners' theory that Section 10(c) mandates immediate judicial review of all final agency decisions is inconsistent with those decisions.

The abstention doctrine provides a second example. When applicable, that doctrine requires district courts to refrain from exercising their jurisdiction, even though the plaintiff has complied with all statutory prerequisites for bringing suit. See, *e.g.*, *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Younger* v. *Harris*, 401 U.S. 37 (1971); *Colorado River*

Water Conservation Dist. v. *United States*, 424 U.S. 800 (1976). This Court has required dismissal of suits under the abstention doctrine, see *e.g.*, *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341 (1951), even where such dismissal could have the effect of eliminating entirely a plaintiff's claim because the state process on which the abstention was based is no longer available. *E.g.*, *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 611 n.22 (1975); *Hicks* v. *Miranda*, 422 U.S. 332, 351 n.20 (1975).

Similarly, in *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9, 19 (1987), this Court held that district courts must decline or postpone the exercise of jurisdiction over claims arising on Indian reservations until the plaintiffs have exhausted any remedies available to them in tribal court, including the pursuit of any tribal appeals. The Court recognized in *National Farmers Union* that the district court had federal question jurisdiction over plaintiffs' claim under 28 U.S.C. 1331, see 471 U.S. at 850-853, and did not cast any doubt on plaintiff's allegation in *Iowa Mutual* that the district court had diversity jurisdiction over its complaint, see 480 U.S. at 16. In terms directly applicable to this case, the Court nonetheless held that "[u]ntil [tribal] appellate review is complete, the [tribal courts] have not had a full opportunity to evaluate the claim and federal courts should not intervene." *Iowa Mutual*, 480 U.S. at 17; accord *National Farmers Union*, 471 U.S. at 857 ("exhaustion is required before [plaintiff's] claim may be entertained by a federal court").[11]

[11] Among the rationales advanced for application of the exhaustion doctrine were the requirements of the "orderly administration of justice," the need to give a tribal court "a full opportunity * * * to rectify any errors it may have made," and the desirability of giving the federal court "the benefit of [the tribal court's] expertise." *National Farmers Union*, 471 U.S. at 856, 857; see *Iowa Mutual*, 480 U.S. at 16-17. The same principles support application of the exhaustion doctrine in this case.

Finally, under the doctrine of primary jurisdiction, a federal court must decline to hear a claim that is concededly "originally cognizable in the courts," *United States* v. *Western Pacific R. R.*, 352 U.S. 59, 63-64 (1956), until the plaintiff first seeks relief from an administrative agency. Despite the fact that all jurisdictional and other statutory prerequisites may be met, a district court must suspend its processes or dismiss the case "whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Id.* at 64. See, *e.g.*, *Communications Workers* v. *Beck*, 487 U.S. 735, 742-743 (1988); *Far East Conference* v. *United States*, 342 U.S. 570, 577 (1952).

C. Petitioners' Construction Of Section 10(c) Would Disrupt Orderly Judicial Review Of Agency Action

Applying petitioners' theory would disturb numerous administrative procedures in which an intermediate agency decision becomes final if no party pursues further internal remedies. The HUD regulations at issue in this case provide an example.

HUD's regulations provide that, at two stages, a party may choose to waive its defenses and permit a debarment to become final. First, a party served with a notice of proposed debarment has 30 days to request a hearing. If no hearing is sought, "the proposed

decision to debar [becomes] final." 24 C.F.R. 24.313(a). Second, if a hearing is sought, the hearing officer's determination that debarment is appropriate "shall be final." 24 C.F.R. 24.314.

Petitioners contend that, because the hearing officer's decision has become final due to their own failure to seek secretarial review, it is subject to immediate judicial review. By the same reasoning, a party that is subject to a notice of proposed debarment could simply wait for the 30-day period for requesting a hearing to pass and then similarly obtain judicial review of the now-final debarment—notwithstanding the fact that the agency's own hearing and decisionmaking procedures have been entirely bypassed.[12] Petitioners' theory, if followed consistently, would permit haphazard review of a variety of preliminary agency decisions that become "final" only because a party has waived its opportunity for administrative review.

If adopted, petitioners' rule would have broad consequences for a large number of common agency practices. Many agency decisionmaking processes are structured like the HUD process at issue in this case. Any administrative process that begins with a proposed agency decision, and provides for that deci-

[12] A party seeking review after having entirely bypassed the agency decisionmaking process may of course have to contend with other obstacles in obtaining judicial reversal of agency action on the basis of arguments not advanced before the agency. See *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952). In such a case, however, the administrative record could contain preliminary submissions of the party or other materials bringing the party's arguments to the agency's attention. If so, the rule of *United States* v. *L.A. Tucker Truck Lines* may not prove to be an insuperable obstacle to a determined plaintiff.

sion to become final if there is no objection, would be vulnerable to attack by litigants who deliberately bypass the agency altogether. Similarly, any agency that permits internal review of an initial decision, but provides for the initial decision to become final if no such review is sought, would find its preliminary decisions subject to judicial review whenever a litigant believed that review at that stage would be to the litigant's advantage.[13]

In sum, petitioners' theory would have results that cannot be squared with any reasonable system of judicial review. Under petitioners' theory, plaintiffs would have the greatest incentive to bypass agency appeal procedures in precisely those cases in which

[13] Indeed, Section 8 of the APA, 5 U.S.C. 557, generally provides for a procedure similar to that of HUD, in which the decision of the presiding officer in an on-the-record adjudication under the APA "becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within [the] time provided by rule." Numerous agencies similarly provide by rule. See 13 C.F.R. 134.32 (SBA); 14 C.F.R. Pt. 302 (Dep't of Transportation); 14 C.F.R. 13.233 (FAA); 22 C.F.R. 51.80-51.89 (Dep't of State); 29 C.F.R. 6.20, 6.34, 6.45, 6.5 (Dep't of Labor); 29 C.F.R. 18.58 (Dep't of Labor); 36 C.F.R. 223.138(b)(8) (Forest Service); 40 C.F.R. 32.335, 32.430 (EPA); 47 C.F.R. 1.302 (FCC). Some regulations, however, specify that a failure to invoke internal administrative remedies precludes judicial review. See, *e.g.*, 7 C.F.R. 1.338(m) (Dep't of Agriculture); 8 C.F.R. 336.9(d) (INS); 10 C.F.R. 2.786(b)(1) (NRC); 21 C.F.R. 10.45(b) (FDA). In such cases, traditional exhaustion principles would not govern. Instead, judicial review of any unappealed decision would be precluded, under Section 10(c), regardless of the adequacy of the administrative appeal process, as long as the initial decision was not given operative effect during the pendency of the appeal. Section 10(c), 5 U.S.C. 704.

such appeals would be most useful—*i.e.*, where the initial decision is poorly stated or does not fairly represent agency policy, but where an internal appeal would likely result in a better reasoned adverse decision. The settled doctrine requiring plaintiffs to exhaust administrative remedies guards against those results and promotes a fair and effective system for agency decisionmaking and judicial review. Petitioners' claim that Section 10(c) of the APA was intended to repudiate the exhaustion doctrine should be rejected.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT IT WAS APPROPRIATE TO DENY RELIEF TO PETITIONERS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

As set forth, Congress authorized federal courts to continue to recognize traditional "limitations on judicial review," 5 U.S.C. 702, including administrative exhaustion requirements, in the adjudication of APA challenges to agency action. 5 U.S.C. 702. Last term, in *McCarthy* v. *Madigan*, 112 S.Ct. 1081, 1086 (1992), this Court reiterated the central principles governing the doctrine of administrative exhaustion. First, even where Congress has not expressly required exhaustion, courts have authority to impose an exhaustion requirement in the exercise of "sound judicial discretion." *Ibid.* Second, it remains the "general rule" that exhaustion of administrative remedies should be required in order to serve the "twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Ibid.* Third, a litigant should be relieved from the requirements of this "general rule" only when the "interest of the individual in retaining prompt access to a

federal judicial forum" outweighs the institutional interests advanced by exhaustion. *Id.* at 1087. The court of appeals correctly determined that these settled principles of judicial administration required petitioners to exhaust their administrative remedies before seeking judicial review under the APA.

A. Exhaustion Of HUD's Administrative Remedies Would Protect Agency Authority And Promote Judicial Efficiency

Under HUD's rules, a hearing officer is authorized to conduct debarment hearings and issue the "initial decision" of the agency. Pet. App. 33a. Thereafter, "[a]ny party" to a debarment proceeding may request discretionary review by the Secretary. 24 C.F.R. 24.314(c). Once a petition for review is filed, the initial decision of the hearing officer is deprived of any operative effect, see 48 Fed. Reg. 43,304 (1983),[14] until the Secretary or his designee either

[14] The cited notice in the Federal Register is an interpretation of HUD's general provisions governing proceedings before a hearing officer, 24 C.F.R. Pt. 26. Those general provisions specify that they apply to debarment proceedings, 24 C.F.R. 26.1, and the debarment regulations specify that secretarial review in debarment proceedings shall proceed in accordance with the provisions of 24 C.F.R. Pt. 26. See 24 C.F.R. 24.314(c). Petitioners assert that "the HUD regulatory scheme subjects a person to administrative sanctions while he contests them before the agency," a fact that in petitioners' view supports their argument that the exhaustion requirement should be excused. Pet. Br. 15-16 n.9; see *id.* at 4 n.5. However, it was the LDP—not the debarment decision itself—that limited HUD's contracting activities during the pendency of administrative proceedings against petitioners. In the court of appeals, petitioners did not challenge the issuance of the LDP as a reasonable means for HUD to protect itself while litigation was pending and, since the LDP had long since

denies review or reaches an independent decision based on the factual record of the initial hearing. 24 C.F.R. 24.314(e). Exhaustion of this administrative appeal process would promote substantial administrative and judicial interests.[15]

1. As this Court explained in *McCarthy*, "[e]xhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise." *McCarthy*, 112 S. Ct. at 1086. Both factors are present here.

The decision to debar a contractor is a "discretionary action[]," see 24 C.F.R. 24.115(a), that must rest primarily with the contracting agency. Debarment decisions are necessarily based upon HUD's expert assessment of the contractor's conduct and the agency's institutional need to prevent further violations of its rules and programs. See 24 C.F.R. 24.115(d) ("The existence of a cause for debarment * * * does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating factors should be considered in making any debarment decision."). The Secretary's expert assessment of petitioner's conduct, and the agency's need to require debarment on the basis of that conduct, could well prove critical to district court review of the debarment orders in this and other cases.

2. Other interests underlying the exhaustion doctrine are also served by the court of appeals' decision. By bypassing the agency appeal procedure, petitioners deprived the agency of "an opportunity to correct its own mistakes," *McCarthy*, 112 S. Ct. at 1086, and created the potential for needless burdens on the judicial system. Exhaustion may obviate the need for federal courts to adjudicate issues and controveries—such as this one—that could be fully resolved in further agency proceedings. *See ibid.*; *McKart* v. *United States*, 395 U.S. 185, 195 (1969).

B. Exhaustion Of HUD Remedies Does Not Impose An Undue Burden On A Litigant's Right To Obtain Judicial Review Of Debarment Decisions

According to petitioners, applying the exhaustion doctrine in this case would "transform[] administrative appeals into a gauntlet that must be run before judicial redress can be sought," and the "attendant costs and delays will deter many persons from seeking judicial review and will devalue any relief ultimately awarded those litigants who do manage to stay the course." Pet. Br. 19. The remedy provided, however, does not engender extended delays or create procedural traps. It is a fair and effective remedy that

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expired and had no collateral consequences, any such challenge would in any event have been moot. See note 3, *supra*. Moreover, if petitioners' argument is that the existence of the LDP excuses their failure to exhaust, it proves too much. If the imposition of interim sanctions excuses them from invoking the secretarial review procedure before going to federal court, it would also presumably excuse them from litigating their debarment at all before the agency—including in a hearing before the ALJ—before bringing their complaint to federal court.

[15] Petitioners cite *Levers* v. *Anderson*, 326 U.S. 219 (1945), for the proposition that a litigant before an agency need not exhaust an administrative remedy that is permissive in nature. As explained above, however, *Levers* involved a permissive petition for rehearing, not an administrative appeal, and the exhaustion doctrine has never been understood to require litigants to request agency rehearing before seeking judicial review. See pp. 22-23, *supra*.

imposes only the most minimal procedural burdens on persons who wish to seek judicial review of debarment orders issued by an ALJ.

1. Contrary to petitioners' contention, the administrative process they bypassed would not have unduly delayed district court review. Under HUD's regulations, petitioners had 15 days to request review by the Secretary. Within 30 days thereafter, the Secretary had to decide whether to grant review, 24 C.F.R. 24.314(c), and, if review was granted, a decision would have been required within 30 days. 24 C.F.R. 24.314(e).[16] Accordingly, exhaustion of petitioners' administrative remedy would have probably taken less than three months. By way of contrast, the district court issued its decision in this case—after several rounds of briefing and arguments by the parties—more than one year after the ALJ's Initial Decision and Order and nearly four months after the expiration of the 18-month debarment imposed on petitioners by that order. Pet. App. 14a, 19a, 90a. In this context, the burden of requiring litigants to defer judicial review for two or three months is certainly reasonable. As set forth, the debarment order would not take effect during this period, and the Secretary's action might have obviated the need for any judicial review whatsoever.

2. Petitioners also contend (Pet. Br. 19) that applying the exhaustion doctrine to those in their position would engender procedural confusion. But petitioners' claim that "[i]n many cases it may be unclear or debatable whether there exists an available administrative appeal that was not exhausted," *id.* at 20, is simply not supported by the unambiguous text of the regulations, which inform litigants that they have a right to appeal to the Secretary at the conclusion of the proceedings before the ALJ. 24 C.F.R. 24.314(c).

It is thus not "unclear or debatable" (Pet. Br. 20) whether petitioners failed to exhaust available administrative remedies in this case. As the court of appeals found, petitioners failed to pursue a readily available administrative appeal, whether "by strategic decision or otherwise." Pet. App. 6a. Nor have petitioners offered any support whatever for their supposition that the availability of an administrative remedy poses difficult questions in other factual circumstances.

3. As the court of appeals recognized, Pet. App. 6a, the fact that petitioners' administrative remedy

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[16] Under the regulations, the Secretary does have the authority to extend these deadlines. 24 C.F.R. 24.314(c), 24.314(e). Citing this Court's decision in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 579-587 (1989), petitioners claimed before the district court and on appeal that the Secretary's right to extend the time periods rendered the administrative process inadequate and thus excused their failure to exhaust it. The district court accepted that argument. See Pet. App. 28a-29a. The court of appeals reversed the district court on that point, observing that petitioners failed to show "that the Secretary has failed, or will fail, to act within a reasonable period of time." Pet. App. 6a. The court also noted that "because [petitioners] did not attempt to exhaust [their] administrative remedies, it is speculative to suggest that the Secretary would have abused his discretion had he been given the opportunity to exercise it." *Ibid.* Before this Court, petitioners do not renew their argument that the administrative remedy was inadequate, and there is no basis for any suggestion that the Secretary would have found it necessary to extend the time periods in this case.

may no longer be available to them does not excuse their failure to exhaust agency processes.[17] See *McGee* v. *United States*, 402 U.S. 479, 483 (1971) (holding that a defendant's failure to exhaust administrative remedies deprived him of a defense to a criminal prosecution). Excusing a party's failure to take an administrative appeal on the ground that the time for doing so expired before suit was filed would permit any potential plaintiff to circumvent the exhaustion doctrine at will by defaulting on any opportunity for internal review before filing suit.[18]

In summary, the opportunity for review by the Secretary offered petitioners the potential for a prompt and effective means of obtaining complete relief from the ALJ's debarment order.[19] The Fourth Circuit correctly held that "the facts [of this case] do not warrant application of the exceptions" to the general rule requiring exhaustion. Pet. App. 7a. Accordingly, settled principles limiting judicial review of agency action barred adjudication of petitioners' claims.

[17] It is possible, of course, that the agency would waive the time limits applicable to administrative appeals under appropriate circumstances.

[18] A court could, in the exercise of its judicial discretion, stay judicial review pending completion of administrative proceedings. Because petitioners have never offered any justification for their failure to pursue agency processes, equitable considerations would not have supported that course of action in this case.

[19] As a recent study suggests, HUD provides litigants in debarment cases with more thorough procedural protections, including the opportunity for decision by an independent decisionmaker and administrative appeal, than do most other agencies. See John H. Frye, III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 Admin. L.J. 261, 315, 316 n.200, 317 (1992).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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APPENDIX

1. Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 702, provides:

Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. Section 10(c) of the Administrative Procedure Act, 5 U.S.C. 704, provides:

Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

3. 24 C.F.R. 24.314 provides:

Determination of hearing officer; review of determination.

(a) *Written determination.* After the participant or contractor has been afforded an opportunity to be heard, the hearing officer shall make a written determination on the evidence presented, including, where appropriate, any evidence of mitigating circumstances. The hearing officer shall issue a determination in accordance with part 26. If it is proposed that the sanction include an affiliate, the hearing officer shall rule specifically whether, and to what extent, the determination applies to the affiliate. The hearing

officer's determination shall be transmitted to all appealing parties by certified mail, return receipt requested.

(b) *Transmission of determination.* The hearing officer's determination shall also be transmitted promptly to the HUD official who invoked the administrative sanction, and to the Office of General Counsel.

(c) *Finality and Secretarial Review.* The hearing officer's determination shall be final unless, pursuant to 24 CFR part 26, the Secretary or the Secretary's designee, within 30 days of receipt of a request decides as a matter of discretion to review the finding of the hearing officer. The 30 day period for deciding whether to review a determination may be extended upon written notice of such extension by the Secretary or his designee. Any party may request such a review in writing within 15 days of receipt of the hearing officer's determination.

(d) Notice of the Secretary's decision to review the hearing officer's determination and notice of the subsequent determination by the Secretary or the Secretary's designee, shall be given in writing, signed by the Secretary or the Secretary's designee and transmitted by certified mail, return receipt requested.

(e) Where a review is granted, the determination by the Secretary or the Secretary's designee shall be based on the record of the initial hearing and shall fully recite the evidentiary grounds upon which the Secretary's determination is made. Such determination shall be issued within 30 days of the decision to grant review, unless written notice is given by the Secretary

or designee extending the period for making a determination.

(f) Each determination shall become a part of the record.

(g) *Notice of debarring official's decision.* After determination in a contested action, or after the expiration of the period for requesting a hearing when no request has been received, the debarring official shall issue a final determination:

(1) Referring to the notice of proposed debarment;

(2) Specifying the reasons for debarment;

(3) Stating the period of debarment, including effective dates; and

(4) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in § 24.215.

(h) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

4. 24 C.F.R. 26.25(a) provides:

Petition for review. Any party may request review of the hearing officer's determination or order by filing a written petition for review with the Secretary within fifteen days of receipt of

the hearing officer's determination or order. A petition for review may be granted or denied in the discretion of the Secretary or designee. This petition shall not exceed ten pages and shall specifically state the issues and basis upon which the party seeks review. This petition shall be served on all parties and the Secretary simultaneously, in accordance with § 26.15.

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